Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977
NO. 77-983

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

v.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

Respondents Puget Sound Gillnetters Association, Philip Sutherland, Purse Seine Vessel Owners Association and Frank Marinkovich, respectfully

join petitioners in praying that a Writ of Certiorari issue to review the opinions and judgments of the Washington State Supreme Court entered in Puget Sound Gillnetters Association v. Moos and Washington Commercial Passenger Fishing Vessels Association v. Tollefson.

OPINIONS BELOW

See the Petition of the State of Washington, et al., and Appendixes B, D and F thereof.

JURISDICTIONAL GROUNDS

See the Petition of the State of Washington, et al.

QUESTIONS PRESENTED

1. Did the Washington State Supreme Court correctly interpret the language of the treaties that the right to fish at usual and accustomed grounds and stations in common with all citizens means that individual Treaty Indians have "an equal opportunity to fish" as opposed to the federal court construction of the same treaties

that Indian tribes are entitled to 50% of the fish?

2. Does an allocation of more than 50% of the harvestable fish to certain treaty tribes who represent .028% of the population of the State of Washington constitute a violation of the constitutional doctrines of equal protection and prohibition of granting of special privileges and immunities?

3. Assuming that the treaties guarantee more than an equal opportunity to fish, are hatchery-reared fish beyond the scope of the treaty?

STATEMENT OF THE CASE

For purpose of this response, we accept the statement of the case contained in the petition, pp. 6-12, with the following addition:

Five cases arising from the United States District Courts of Washington and Oregon (United States v. Washington, (384 F.Supp. 312 (W.D. Wash. 1974) and United States v. Oregon, 302 F.Supp. 899

(OR 1973)), were argued by these respondents before the Ninth Circuit on February 1, 1978.[1] Those cases include the following issues:

(1) Whether the district court in United States v. Washington may take over management of the state fishery to implement its decree, in recognition of the absence of authority in the state to effectuate such decree.

(2) Whether the treaty provisions are non-self executing and therefore beyond the power of a court to implement.

(3) Whether individual commercial fishermen are subject to being named in injunctions by the district courts though they have never been parties to the litigation.

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[1] Puget Sound Gillnetters Association, et al. v. U.S. District Court for The Western District of Washington, No. 77-3129; Columbia River Fishermen's Protective Union, Inc., et al. v. U.S. District Court for the District of Oregon, No. 77-3208; United States of America, et al. v. State of Oregon, et al., No. 77-3209; and United States of America, et al. v. State of Washington, et al., Nos. 77-3654 and 77-3655.

The issues in those pending appeals involve the enforcement of the underlying decisions in United States v. Washington and United States v. Oregon. The court of appeals has indicated it will render a decision prior to the expected commencement of the fishing season in April 1978.

REASONS FOR GRANTING THE WRIT

I. The Decisions of The Washington State Supreme Court Conflict with the Decision of The Ninth Circuit Court of Appeals

The decision of the Supreme Court of Washington in these cases are in direct conflict with the decisions in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), Aff'd 520 F.2d 677 (9th Cir. 1975). The difference between the state and federal courts can perhaps be best expressed in the language of the Washington State Supreme Court:

> The federal district court for the Western District of Washington in United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974) construed the Medicine Creek and other Indian treaties and held that treaty fishermen were entitled to fifty percent of the harvestable salmon in Puget Sound plus such

> salmon as are necessary for ceremonial and sustenance purposes.
>
> This Court, in Department of Game v. Puyallup Tribe, Inc., 86 Wn.2d 664, 548 P.2d 1058 (1976), on a direct remand from the United States Supreme Court, Department of Game v. Puyallup Tribe, 414 U.S. 44, 38 L.Ed.2d 254, 94 S.Ct. 330 (1973), interpreted the same treaty language to mean that the right accorded the Indians under the Medicine Creek Treaty to fish "in common with others" was a right, not to a certain number or percentage of fish, but to an equal opportunity to fish. We further held that if the treaties guarantee more than this to the Indian signatories, then hatchery-reared fish were beyong the scope of the treaty.

Puget Sound Gillnetters v. Moos, 88 Wn.2d at 679.

The Washington State Supreme Court incorporated the interpretation of the "in common with" language contained in Puyallup III, supra, in its opinion in Gillnetters:

> Being cited no authority for the proposition that federal district courts have exclusive jurisdiction to construe Indian treaties--treaties which affect important interests of the state--we adhere to our own interpretation of the treaty.

88 Wn.2d 691.

This Court has recognized many times that a conflict between decisions of the highest state court and the United States Court of Appeals upon questions of federal law is a valid ground for the

issuance of a writ of certiorari. Palmer Clay Products Co. v. Brown, 297 U.S. 227 (1936) where the highest state court refused to follow decisions of a court of appeals upon the construction of the Bankruptcy Act); Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) (where the decision of the highest state court was in conflict with the decision of the United States court of appeals upon a question of admiralty jurisdiction).

The Washington State Supreme Court has on at least three separate occasions recognized the conflict between its interpretation of the treaty language and that of the federal courts. It has said that this court is the only court which can decide with finality this conflict.[2] Resolution of the conflict between the state and federal

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[2] Washington State Commercial Passenger Fishing Vessels Ass'n v. Tollefson, 87 Wn.2d 417, 421, 553 P.2d 113 (1976); Department of Game v. Puyallup Tribe, Inc., 86 Wn.2d 664, 548 P.2d 1058 (1976); and Puget Sound Gillnetters Ass'n v. Moos, 88 Wn.2d 677, 698, 565 P.2d 1151 (1977).

courts in their interpretation of the treaty language is, in itself, sufficient reason for this court to grant the writ.

II. The Decisions of The Washington State Supreme Court in These Cases Involve the Construction of Treaties

Even in cases in which there was an absence of conflict between the decisions of the state and federal courts, this Court has granted certiorari to review decisions of the highest state courts involving the construction of treaties. This is especially true when the state court's decision involves unsettled questions respecting the construction of treaties or federal statutes of long standing. Santovincenzo v. Egan, 284 U.S. 30 (1931). This Court has never construed the treaty language "in common with." The proper construction of the treaty language cannot be settled until this Court addresses that issue.

III. The Decisions of the Washington State Supreme Court in These Cases Raise Unsettled Constitutional Questions

Supreme Court Rule 19(a) provides that unsettled questions arising under the federal constitution is a factor to consider in deciding whether to grant a writ of certiorari. The Washington Supreme Court specifically held in both cases below that the allocation required by the federal courts of fifty percent of the harvestable salmon to treaty Indians representing .028% of the state population required by the district court violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and constitutes the granting of special privileges and immunities. Gillnetters, 88 Wn.2d at 684, Fishing Vessel, 89 Wn.2d at 285. This Court has never specifically addressed this issue.

This Court has on many occasions granted petitions for a writ of certiorari when state courts have decided unsettled questions arising under the federal constitution. Powell v. State of Alabama, 287 U.S. 45 (1932), and Cumberland Coal

Co. v. Board of Revision of Tax Assessments in Greene County, 284 U.S. 23 (1931).

IV. Special and Important Reasons Mandate the Granting of a Writ of Certiorari in These Cases

The issues raised by the Gillnetters and Fishing Vessel cases are not isolated esoteric problems for review by this Court; nor do they involve issues of purely private import. Multiple litigation in both the state and federal courts has resulted in fragmented management and general disorder in the salmon fishery of Washington State. The state and federal courts have enjoined Fisheries and its director from enforcing regulations which they have adopted for the regulation of the fishery. The confusion and conflict is rooted in the differing interpretations of the treaty language "in common with." This Court must compare the conflicting interpretations of the treaty and select which is to be the law of the land. If this Court does not now resolve the questions presented

by the Gillnetters and Fishing Vessel cases, the conflict, controversy and uncertainty will continue.

The absence of an authoritative interpretation of the meaning of the treaty language and a ruling by this Court on the other issues raised by these cases is, perhaps, the single most important factor in the continuation of the fishing rights controversy in the State of Washington. Not only have the parties hereto and the Washington Supreme Court welcomed a ruling on these issues by the court, but so have elective and appointive federal officials.

On February 11, 1977, the Washington Congressional Delegation sent a letter to the Attorney General of the United States, urging him to place these issues before this court. The letter provided that:

> While we take no position on the merits of the issues, their authoritative resolution by the Supreme Court would benefit all parties.

Appendix A, A-1.

In addition, the President of the United States has appointed a Presidential Task Force

on Northwest Fisheries which was authorized to investigate the problem in the Washington salmon fishery. In an open letter to the Washington State Salmon and Steelhead Fishing Committees written in December 1977, by the chairman and two members of the regional team of the Presidential Task Force, the need for this Court to review the construction of the language of the treaty was also recognized. The letter said in part:

> From our perspective, a tragic omission occurred when the Departments of Justice and Interior failed to seek a Supreme Court review of the U.S. v. Washington decision which might have precluded the need for many of the recent court battles.

We respectfully submit that the significance of this statement cannot be overemphasized. It is the same statement which we have made to this Court in the past. The statement is significant because it was made by members of a federal task force after they had objectively investigated the fishing conflict in the State of Washington. Even the United States, which has appeared as amicus in the Gillnetters case, has recognized the need for review of these issues by this Court.

In open argument before a panel of justices in the Ninth Circuit Court of Appeals on February 1, 1978, an attorney for the Department of Justice stated that she felt the United States would not support the petition for a writ of certiorari, but might support such a petition in the cases which were before the court of appeals. Unfortunately, this is not the first time that an attorney for the United States has attempted to forestall a review or decision of these issues by a statement that they would support review of these issues by this Court in some other case.

In the argument of the Gillnetters case on November 9, 1976, Edmund B. Clark, Chief of Appellate Section, Land and Natural Resources Division of the Department of Justice, appearing on behalf of the United States amicus curiae, argued that the state court should not take jurisdiction, because he would probably urge this court to resolve the basic issues in Puyallup Tribe, Inc. v. Department of Game, U.S. Supreme Court No. 76-423. However, the Department of Justice in its amicus brief to this court, joined the Puyallup Tribe

in suggesting that the issues be restricted to the regulation of the reservation fishery rather than to the basic issues in that case.

It is submitted that this Court should grant the writ on the questions posed by this response. If the Court is not disposed to grant the writ at this time, it should defer ruling on the granting or denial of the writ until such time as the Court of Appeals for the Ninth Circuit decides the pending appeals so that all aspects of the controversy may be examined.

CONCLUSION

On the basis of the reasons set out below, this Court should issue Writs of Certiorari to

review the judgments and the opinions of the Supreme Court of the State of Washington.

Respectfully submitted,

JOSEPH T. MIJICH/JOHN P. WORLD
Attorneys for Respondents
Purse Seine Vessel Owners
Association and Frank
Marinkovich

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STATE OF WAS.

COMMITTEE
MERCHANT MARINE AND FISHERIES
INTERNATIONAL RELATIONS
SELECT COMMITTEE ON AGING

Congress of the United States
House of Representatives
Washington, D.C. 20515

February 11, 1977

RECEIVED
FEB 23 1977
Ass't.....

Honorable Griffin Bell
United States Attorney General
Washington, D.C.

Dear Mr. Attorney General:

The Indian fishing rights controversy in the State of Washington remains in something of a legal fog. Opportunity is now at hand for the United States Supreme Court to finally resolve the legal uncertainty. While we take no position on the merits of the issues, their authoritative resolution by the Supreme Court would benefit all parties.

In several different cases, Federal District Courts and the Ninth Circuit Court of Appeals have rendered opinions at variance with opinions of the Supreme Court of Washington on these basic issues:

1. Limitations on the right of the state of Washington to manage the resource in the interest of conservation.

2. The exclusion of hatchery-propagated fish from the treaty fishery.

3. The interpretation of the treaty language "in common," which results in the allocation of fish to various user groups.

The United States Supreme Court recently granted certiorari in the case of Department of Game v. Puyallup Tribe, Inc. We feel this case is a vehicle for resolution by the United States Supreme Court of these basic issues. Without

stating any opinion on the merits, and certainly without urging any posture upon the Department of Justice, we do urgently request the Department seek in its amicus brief to present the issues to the court.

Sincerely,

Warren G. Magnuson, U.S.S.

Henry M. Jackson, U.S.S.

Don Bonker, M.C.

Lloyd Meeds, M.C.

Norman D. Dicks, M.C.

Joel Pritchard, M.C.

Congress of the United States
House of Representatives
Washington, D.C. 20515

February 11, 1977

Honorable Cecil Andrus
United States Secretary of the Interior
Washington, D.C.

JAN 16 1977

Dear Secretary Andrus:

Attached is a copy of a letter which we have sent to Attorney General Griffin Bell.

We are asking the Attorney General for his help in ensuring that the Supreme Court decides three basic issues at the heart of the Indian fishing rights controversy in the State of Washington. The Court has the opportunity to do so in the pending case of Department of Game v. Puyallup Tribe Inc. We take no position on the merits of these issues but feel strongly that the resolution of these issues is in the best interests of all parties.

We hope you are able to agree and to ask the Department of Justice to seek in its brief (due for filing February 25) to have the Court hear the issues noted in our letter to the Attorney General.

Sincerely,

Warren G. Magnuson, U.S.S.

Henry M. Jackson, U.S.S.

Don Bonker, M.C.

Lloyd Meeds, M.C.

Norman D. Dicks, M.C.

Joel Pritchard, M.C.